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JOSE D. LEON GUERRERO

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PORT AUTHORITY OF
GUAM

PORT AUTHORITY OF GUAM BACK WAGES SERIES, PART B

PERFORMANCE AUDIT
October 2010 through April 2021

OPA Report No. 21-09
December 2021





Port Authority of Guam Back Wages Series, Part B

**Performance Audit
October 2010 through April 2021**

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December 2021**

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EXECUTIVE SUMMARY

Port Authority of Guam Back Wages Series, Part B
OPA Report No. 21-09, December 2021



Our performance audit of the back wages of two reinstated Port Authority of Guam (Port) employees – “Employee S” and “Employee T”– found that Port’s reinstatements of these two employees were generally made in accordance with administrative and judicial review judgments and orders. The legal remedies stipulated in the *Agreement to Satisfy Judgment* and *Settlement Agreement* were likewise complied by the Port. The Port paid a total of **\$1.0 million (M)** as legal remedies of Employee S and Employee T.

However, in our review of documentation provided and analysis of processes executed to satisfy legal remedies, we found deficiencies in documentation, deviations from certain provisions of Port Personnel Rules and Regulations (PRR) and internal policies, deficiencies in calculations resulting in discrepancies and overpayments, conflicting Notification of Personnel Action (NPA), non-deduction of withholding tax for back wages, and other matters of concern.



The Port paid a total of \$1.0 million (M) as legal remedies of Employee S and Employee T.



Specifically, we found:

- Legal remedies paid (satisfied) without board ratification by a resolution;
- Inconsistencies and deficiencies in the *Agreement to Satisfy Judgment and Settlement Agreement*;
- Deviations from certain provisions of Port's Personnel Rules and Regulations
 - Highest number of incremental sub-steps granted annually without the required performance evaluations approved by the former General Manager (GM);
 - Annual salary increments based partly on three prior years' "Outstanding" or "Highly Satisfactory" rating not approved by any GM.
 - Discrepancies in using the "Outstanding" and "Highly SAT" ratings instead of eligible "Marginal Satisfactory" rating due to the absence of or NRPER not approved by former GM; and
 - Conflicting Notifications of Personnel Actions.
- Deficiencies in Port back wages calculations resulting to potential overpayments due to:
 - Unapproved increments due prior to employees' terminations included in paid back wages; and
 - Questionable and unaccounted back wages paid.
- Income Tax withholding not deducted from paid back wages.
- Other Matters
 - Potential violation prohibition on retroactive pay raises
 - Pay raise prior to end of freeze period potentially violated the freeze increment mandate.
 - Appearance of conflict of interest

Legal Remedies without Board Ratification by Resolution

Employees S and T were reinstated in November 2019 and January 2020, respectively into the same positions when they left the Port as mandated. Both employees received back wages and other benefits, attorney's fees, and legal costs, totaling \$1M as prescribed in the agreements. However, the Port management paid these legal remedies and terms without seeking the Board's ratification via resolution.

There was no Board Resolution for the reinstatement of Employee S and ratification of the legal remedies, even though the reinstatement was ordered per the Civil Service Commission (CSC) - Decision and Judgment dated March 2015 and November 2019. The Port management confirmed the lack of Board Resolution and provided a duly executed Agreement to Satisfy Judgment.

Whereas Board Resolution No. 2019-20 relative to the reinstatement Employee T, merely authorized the Port to offer a settlement agreement with the employee and authorized the Port's Deputy GM to execute and deliver all documents and undertake acts to comply with the terms of the settlement.

Deviations from Certain Provisions of Port's Personnel Rules and Regulations

Highest Number of Incremental Sub-Steps Granted Annually without the PRR Required Performance Evaluations Approved by the Former GM

We reviewed Port's calculation of the reinstated employees' back wages during the seven-year employees' termination period. We found that the Port consistently used the **"5" sub-steps** for Employee S and **"4" sub-steps** for Employee T, which correspond to an "Outstanding" and "Highly Satisfactory" ratings, respectively. The Port's average calculation methodology resulted in gross back wages amounting to \$537K for Employee S and \$189K for Employee T, which was mathematically correct. Comparatively, another autonomous agency considered **"5" as a rare rating, which means that the employee significantly exceeded expectations.**

We respect that Port's calculation was based on the understanding that reinstated Employees S and T's back wages and benefits should be processed as if there was no work interruption. Port confirmed that the annual increments granted to the employees during their termination periods were based on the **average ratings** of employees' last three years' employment at the Port (2010, 2011, and 2012). In the absence of a required annual performance evaluation for every increment period, Port resorted to this average calculation method because management believed that these employees could render a consistently "Outstanding" performance during the seven-year termination period. They explained that the surrounding circumstances are not regular and that Port addressed this issue differently fitted with the prevailing circumstances.

We verified that the annual increments granted for 2013 through 2019 (seven years) were not supported with duly accomplished performance evaluation reports, which need to be approved by (and accountable to) the former GM, in compliance with the Ports PRR 6.302 and 7.010. Based on this PRR provision, without any approved performance evaluation reports, Port would have no valid basis in calculating applicable sub-steps and granting the increments.

After the “5” or “4” sub-step annual salary adjustments from 2012 thru 2019, Employee S got an adjusted annual salary of \$118K and Employee T received an adjusted annual salary of \$52K upon their reinstatements.

Annual Salary Increments Based Partly on Three Prior Year “Outstanding” or “Highly Satisfactory” Ratings not Approved by any GM

We verified employees’ performance evaluation reports for 2010, 2011, and 2012 to determine if these employees got average ratings of “Outstanding” and “Highly Satisfactory”. Our verification and recalculation found that Employees S & T got averages of “**Marginal Satisfactory**” rating or are eligible only of “**2**” **sub-steps** due to the lack of Notice of Results of Performance Evaluation Report (NRPER) or NRPER were not signed by the former GM to signify his approval of the recommended increments. The recalculated **eligible “2” sub-steps** for Employees S & T is way below compared with the “**5**” or “**4**” **sub-steps** granted by Port. The recalculated **eligible “2” sub-steps** for Employees S & T as opposed to “**5**” or “**4**” **sub-steps** granted by Port resulted in discrepancies totaling \$105K. This discrepancy could have a financial impact on the Port.

Discrepancies in Using the “Outstanding” and “Highly Satisfactory” ratings (“5” or “4” sub-steps) Instead of Marginal Satisfactory Rating (“2” sub-steps) due to Absence of or NRPER not Approved by former GM

We acknowledge Port management’s efforts to provide reinstated Employees S and T with all the expected benefits “**to make the employee whole**” as if they were not terminated. However, the audit’s calculation of the average rating for the three prior years resulted in a “**Marginal Satisfactory**” rating (“2” sub-step) as opposed to “Outstanding” or “Highly Satisfactory” (“5” or “4” sub-steps) in Port’s calculation of annual increments. The “Marginal Satisfactory” rating for which the employees were eligible stemmed from the absence of **approved performance evaluation documents** required per Ports’ PRR Section 6.302, 7.008, and 7.010.

The Port explained that since the employees were deprived to work with Port to prove the consistency of their “Outstanding” performance ratings, they should not be penalized by receiving a lower rating due to the absence of approval by the former GM. Thus, the Port used the “Outstanding” or “Highly Satisfactory” rating equivalent to “5” or “4” sub-steps.

In Part A, Port management responded to this similar finding that there was no letter from the former GM denying the employee increment. It further stated that leaving a performance unsigned should not be akin to rejecting it.

Since the auditors deal with evidentiary documents, an absence of GM’s signature on the NRPER could also be interpreted as **unapproved**. Therefore, the employee might not be eligible for an increment of “5” or “4” sub-steps.

By not using the eligible “2” the incremental sub-steps, this resulted in discrepancies in paid back wages approximately totaling to \$105K, which could have a financial impact on Port.

Conflicting Notification of Personnel Action

The \$189K back wages (net of offset) was arrived at by using hourly rates, which did not conform to the hourly rates reflected on the supporting NPA's provided. The Port explained that their subsequent calculations, which were made upon the employees' reinstatements, were guided by the amounts reflected in the *Settlement Agreement* as agreed between the employees and the Port representatives. Human Resources Department prepared the NPAs upon the employees' reinstatement based on the agreed sub-steps for increment in accordance with the Pay Schedule. Thus, NPA hourly rates would potentially be discrepant (different) against the hourly rates used in employees' calculations for the *Settlement Agreement*. Since settlement agreements would legally bind and obligate parties for compliance, the back wages amounts should be stated therein reviewed and validated by both parties.

Since NPAs are actionable documents, which support the Pay Grade/Scale and the hourly rate that should be paid to employees, these must reflect accurate pay rates that support incremental payments.

Deficiencies in Port Back Wages Calculation Resulting in Potential Overpayments

Unapproved Increments Prior to Employees Terminations Included in the Paid Back Wages

Back wages paid to Employee S and Employee T included increments totaling \$1,939 prior to the employees' terminations (10/07/12-12/12/12 and 10/07/12-02/23/13). The Port based these increments were based on NPAs prepared in 2019 and 2020, signed by the current GM. According to Port's responses, the former GM did not sign the 2013 prepared NPAs thus were replaced. The NRPER, which supported the 2013 NPAs were, likewise not signed by the former GM. The absence of GM signature apparently indicated non-approval; there was no valid basis for granting the employees increments with the highest number of incremental sub-step of 5% or 4%, respectively. Besides, per Civil Service Commission–Decision and Judgment, the employees shall be compensated for all the time **following their December 2012 and February 2013 terminations, respectively until the dates they are reinstated.**

Per Port's response to OPA questions, management stated that the employees did not receive the increments that were due to them prior to their termination.

Questionable and Unaccounted Additional Back Wages Paid

Our verification of Port's calculation of back wages paid to Employee T found that the actual gross back wages of \$318K were over by \$20K. This amount labeled as "**non-tax item**" was added to Port's original calculated back wages of \$299K. This item could not be identified with any pay period in Port's calculation. In Port's response, it stated that the item was miscategorized and part of the settlement amount.

Income Tax Withholding not deducted from Paid Back Wages

The Port did not deduct back wages totaling \$189K with payroll tax, specifically "income tax withholding". The *Settlement Agreement* provided that the first installment should only be

deducted with payroll taxes, which include among others federal income tax, Medicare, etc. Non-deduction of income tax withholding was based on the employee's request. During the November 2021 discussion, the Port stated the employee requested not to tax the lump sum amount and that the payment of income tax is the responsibility of the employee.

In Form W-4 (Employees Withholding Allowance Certificate), if the employee meets the requirement for tax exemption from federal income tax withholding, the employee can claim exemption on IRS Form –W-4. The employee's W-4 form for 2020 (2019 form altered to 2020) was not marked that the employee was "**Exempt**".

Per Internal Revenue Regulations Employer & Employee Responsibilities, it stated that employer and employee hold the responsibility for collecting and remitting withholding taxes to the Internal Revenue Service (IRS). In cases where an employer does not do this, or where an employee is self-employed, it is the responsibility of the employee to pay these withholding taxes.

Other Matters

Although not directly related to our audit objective, we became aware of other concerns that warrant Port's attention.

Potential Violation on Retroactive Pay Raises

The Port revised the NPAs prepared in August 2013 for the annual increments of Employee S and Employee T effective October 2012. These increments were due **prior to the employees' terminations in December 2012**. The revised (new) NPAs were prepared and signed by the current GM in 2019 and 2020 and were effected **retroactive October 2012**. These increments were retroacted seven (7) and eight (8) years after the increments were due. These new NPAs replaced the NPAs prepared in 2013 because the former GM did not sign the evaluation reports.

In the Attorney General of Guam's (AG) opinion issued in November 2021, he cited 4 GCA §6218.1 - Prohibition on Retroactive Pay Raises which covers all classified and unclassified employees of GovGuam. In his conclusion, he stated that unless authorized by statute and regardless of justification, **Government of Guam employees are prohibited from receiving salary increases that are paid retroactively from the date of authorization**. Salary increments based upon performances can only be paid prospectively, upon authorization date, and not retroactive from any date prior. Any retroactive payment is prohibited by Guam law.

Pay Raise Prior to End of Freeze Period Potentially Violated the Freeze Increment Mandate

P.L. 34-116, Chapter 13, Section 3 mandated a freeze on all salary increments, promotions, reclassifications, merit bonuses, and any other upward pay adjustments to take effect from October 1, 2018, through September 30, 2019. The law further specified that the payment of increments and merit bonuses ***must not be retroactively applied***.

Four days after the public law passed a pay raise freeze, on August 24, 2018, Port passed board resolution no. 2018-05 on August 28, 2018, to adopt an updated pay plan that would result in an agency-wide pay adjustment (pay raise) which took effect **October 1, 2017**. The employees received salary increments effective October 13, 2017, up to September 15, 2018. With the

majority of Port employees at risk of not getting their annual salary increment, Port implemented an agency-wide pay adjustment to take effect **on September 16, 2018** – two weeks before the statutory freeze started on October 1, 2018.

To authorize for the two-week period, this salary increment is an apparent violation of P.L. 34-116:13:3. An overpayment of \$400 to two employees may appear minimal. However, the cumulative financial impact of Port’s action of granting increments within the freeze period could be significant depending on the number of employees involved.

Appearance of Conflict of Interest

The Port’s incumbent Deputy General Manager (DGM) served as the Chairman of the Board of the Civil Service Commission (CSC) from 2003 to 2019, until he transferred to the Port of Authority of Guam in December 2019. As Chairman of the CSC Board of Commissioners, he signed the CSC Decisions and Judgments of the appeal cases of Employees S & T between 2014 and 2019. The CSC Board Chairman joined the Port Authority of Guam in December 2019 as Deputy General Manager for Finance and Administration. From then on, he signed the Agreement to Satisfy Judgement and NPAs for Employee T’s reinstatement and annual salary increments from 2012 to 2019, which were all prepared in January 2020.

With the incumbent Deputy GM’s participation in the CSC - Appeal Case Judgment Promulgation and signing of Port documents related to the employees’ reinstatement, these portrayed an **appearance of a conflict of interest**. Although the incumbent GM has no financial interest in his official actions and neither is he related to the reinstated employees, as declared by the Port GM, we refer the applicable provision of 4 GCA Chapter 15, Standard of Conduct for Elected Officers, Appointed Officers, and Public Employees of the Government of Guam §15210-Restrictions on Post Employment, which states:

“No former employee shall, within twelve (12) months after termination from employment, assist any person or business, or act in a representative capacity for a fee or other consideration, on matters involving official action by the particular territorial agency with which the employee had actually served”.

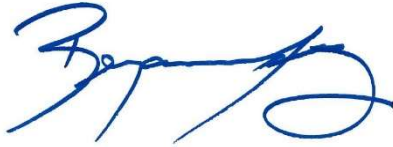
As former Chairman of the Board of CSC, the incumbent DGM had served any GovGuam agency by rendering decisions relative to the cases filed with CSC by an agency involved. Therefore, it would have been prudent for the DGM to recuse himself from participating in Port actions relative to the employees’ reinstatements.

Conclusion and Recommendation

Based on Civil Service Commission Decision and Judgment, Employees S & T, have to be reinstated and be fully compensated to include salaries and all benefits, under the Guam law, for all the time following their terminations until the date they are reinstated. We acknowledge and commend the Port’s adherence to the CSC decision with the intention “to make the employee whole” and processed salaries and benefits as if there was no work interruption. However, in the implementation processes and execution of legal remedies, Port also needs to comply with its Personnel Rules and Regulations specifically on performance-based annual increments. Certain

deviations from PRR and other internal policies resulted in discrepancies of approximately \$105K and potential overpayments of \$22K, which could have a potential financial impact on the Port.

In the absence of any provision in the PRR relative to the processing of annual increments for reinstated employees, it is prudent for the management to seek Board's advice on the appropriate course of action relative to annual increments or seek the Attorney General's opinion. Moving forward Port management and the Board should decide on how this PRR requirement on annual increments for reinstated employees be satisfactorily complied. In this audit, we made six recommendations.



Benjamin J.F. Cruz
Public Auditor



Introduction

This report presents the results of our performance audit on the Port Authority of Guam’s (Port) execution of settlements, or legal remedies, of the next two (2) of the six (6) remaining reinstated employees based on resolved Civil Service Commission (CSC) cases.

Consistent with Part A, our audit objective was to determine whether Port’s settlements or legal remedies were properly accounted for and paid in accordance with applicable laws, regulations, and administrative and judicial review judgments. However, this specific report (Part B) focused on the audit results of two of the seven reinstated employees, herein referred to as “Employee S” and “Employee T”.

Our audit scope covered the court orders and judgments, Port documents, and other documents that contributed to Port’s calculations and payments to Employee S and Employee T’s legal remedies during our audit engagement (i.e., October 2010 through April 2021).

Results of our audit on Part A for Employee Q were released to the public in OPA Report No. 21-03 in February 2021. Our audit results on the remaining four employee’s settlements will be issued in a separate audit report. We detailed the objective, scope, and methodology, and prior audit coverage in Appendices 1 and 2.

Background

Port is a public corporation and autonomous Government of Guam (GovGuam) agency, for which primary revenues are derived from providing services to major shipping line customers, tariffs, and rentals of equipment and spaces related to ocean commerce, recreational and commercial boating, and navigation. Since fiscal year (FY) 2016, Port’s revenues averaged \$54.4 million (M) a year. On average, 98% of Port’s revenues were derived from the tariffs and rentals paid by Port customers (ratepayers). Port prides itself in dedicating all of its profit to the upgrading of its equipment and facilities and the continued growth of Guam's seaport.

Court Settlements of Multiple Employee Termination Lawsuits

The Port has been a defendant in nine employees’ adverse action (termination) lawsuits. All nine of these employees were reinstated to their original employment position and paid back wages. Back wages represent the salaries owed to an employee for the period following their unlawful termination until they are reinstated. The Port provided other legal remedies such as reimbursement for the attorney’s fees and legal costs related to the employee’s lawsuit, and interest for the delay and loss of use of back wages as ordered in a court’s decision and or settlement agreements.

Our initial audit scope included nine reinstated employees with whom the Port executed settlements or legal remedy payments. Based on auditor’s professional judgment, we decreased our scope to seven reinstated employees. In reiteration, the public demanded for transparency on whether Port was following the law when executing these settlements or legal remedies.

Results of Audit

The Port's reinstatement of Employee S and Employee T were generally made in accordance with administrative and judicial review judgments and orders. Additionally, the legal remedies stipulated in the *Agreement to Satisfy Judgment* and *Settlement Agreement* were generally complied with by the Port.

The Port paid a total of \$1 million (M) for two employees, Employee S and Employee T, for back wages, retirement contribution, Medicare tax, and attorney's fees and legal costs as directed in the formal agreements executed by the Port Deputy General Manager (DGM) or Port authorized representative and the two employees. See Figures 1 and 2 for details.

Figure 1: What Port Paid to Employee S - \$729K



Figure 2: What Port Paid to Employee T- \$300K



However, in our review of documentation provided and analysis of processes executed to satisfy legal remedies, we found deficiencies in documentation, deviations from certain provisions of Port Personnel Rules and Regulations (PRR) and internal policies, deficiencies in calculations resulting in discrepancies and overpayments, conflicting Notification of Personnel Action (NPA), non-deduction of withholding tax for back wages and other matters of concern.

Specifically, we found:

1. Legal Remedies Paid without board ratification by a resolution;
2. Inconsistencies and Deficiencies in the *Agreement to Satisfy Judgment* and *Settlement Agreement*;
3. Deviations from Certain Provisions of Port's Personnel Rules and Regulations

- Highest Number of Incremental Sub-Steps Granted Annually Without Performance Evaluations Approved by the former General Manager (GM);
 - Annual Salary Increments Based Partly On Three Prior Years’ “Outstanding” Or “Highly Satisfactory Ratings Not Approved by Any GM;
 - Discrepancies in Using The “Outstanding” And “Highly SAT” Ratings Instead of Eligible “Marginal Satisfactory” Rating Due to The Absence of NRPER or NRPER Not Approved by former GM; And
 - Conflicting Notifications of Personnel Actions.
4. Deficiencies in Port Back Wages Calculations Resulting in Potential Overpayments Due to:
- Unapproved Increments Due Prior to Employees’ Terminations Included in Back Wages; And
 - Questionable and Unaccounted Additional Back Wages Paid.
5. Income Tax Withholding Not Deducted from Paid Back Wages.
6. Other Matters
- Potential Violation On Retroactive Pay Raises;
 - Pay Raise Prior to End of Freeze Period Potentially Violated the Freeze Increment Mandate;
 - Appearance of Conflict of Interest.

Legal Remedies Paid without Board Ratification by a Resolution

According to 12 GCA Chapter 10 §10107(d), Port’s General Manager (GM) must approve the payment demands of Port’s obligations *within the purposes and amounts authorized by the Board of Directors*.

Employee S and Employee T were reinstated in November 2019 and January 2020, respectively into the same positions when they left the Port as mandated. Both employees received back wages and other benefits, attorney’s fees, and legal costs, totaling \$1M as prescribed in the agreements. However, the Port management paid these legal remedies and terms without seeking the Board’s ratification via resolution. See Table 1 below for details.

Table 1: Summary of Legal Remedies Paid

Type of Payments	Employee S	Employee T	Total
Back Wages (Net of Mitigation)	\$536,864	\$189,316	\$726,180
Port Contribution for Employee Retirement	\$144,185	\$54,903	\$199,088
Attorney’s Legal Fees	\$40,000	\$50,555	\$90,555
Port’s Share of Medicare Tax	\$7,775	\$5,490	\$13,265
Total Payments	\$728,824	\$300,264	\$1,029,088

There was no Board Resolution for the reinstatement of Employee S and ratification of the legal remedies, although the reinstatement was ordered per the Civil Service Commission (CSC) - Decision and Judgment dated March 2015 and November 2019. In its March 2015 decision, the CSC ordered to fully compensate the employee for all the time following his/her termination until

reinstatement. The Port management confirmed the lack of Board Resolution and provided, however, a duly executed *Agreement to Satisfy Judgment*.

While for Employee T, Board Resolution No. 2019-20 relative to her reinstatement merely authorizes the Port to offer a settlement agreement with the employee and authorized the Port's Deputy GM to execute and deliver all documents and undertake acts to comply with the terms of the settlement.

To reiterate, in Public Law (P.L.) 32-076, the Guam Legislature found that full disclosure of decisions made by appointed public officials – on behalf of GovGuam – with individuals, private businesses, or other governments, provides an opportunity for review and scrutiny of such decisions. It also found that with full disclosure, public officials and GovGuam are more accountable in aligning settlements with the public's interest, as well as building a climate of public trust. Board resolutions are public records and, will provide the public full transparency of Port's remedial actions on reinstated employees.

To achieve full disclosure and transparency, the Port management/GM needs to seek the Board's ratification when executing judgments that concern personnel compensation because of the potential legal and financial repercussions on Port's operations. Considering the significant financial impact of Port's management action, we reiterate our recommendation for the Port management to seek the Board's ratification via board resolution specifying the legal remedies such as the composition of the total back wages, interest, and legal fees and other costs.

Inconsistencies and Deficiencies in the Agreement to Satisfy Judgment and Settlement Agreement

Employee S and Employee T executed *Agreement to Satisfy Judgment* and *Settlement Agreement*, respectively, specifying the amounts and terms for back wages, benefits, and attorney fees Port has to pay as well as a liability release provision. However, we noted deficiencies and inconsistencies in the executed documents. Specifically:

- **Employee S – Agreement to Satisfy Judgment**
 - a. The document was executed in December 2019, by both the Port management authorized representative and the employee 18 days after the employee reinstatement in November 2019.
 - b. The same document did not contain a provision for the mutual release of all claims and forever discharge of both parties from any legal liability, claims, obligations, demands, and damages, and actions arising out of or in any way connected with the employment. It simply stated that after the parties perform the terms of the agreement, no further action at law or administrative law should lie with respect to the judgment of the case.
 - c. The document reflected a base pay of \$537K and a net back wages of \$427K, which is a net of payroll deductions of \$110K. This disclosure is not consistent with the other settlement agreements, which disclosed back wages net of mitigation for earnings from outside employment.

- d. No Employee Wage and Tax Statement (W-2) supported the mitigation of \$148K to verify the correctness of earnings declared and mitigated. This covered the period 7/11/16 to 11/22/19 when the employee was working with a certain GovGuam agency. According to Port, the employee did not provide W-2.
 - e. Per Port's admission, the employee likewise did not provide them with documents attesting to the employee's unemployment from December 18, 2012, to July 10, 2016.
- **Employee T – Settlement Agreement**
 - a. The *Settlement Agreement* did not disclose the gross back wages but only an amount of \$189K after set-off. The nature and amount of set-off were neither disclosed. The calculated gross amount was \$318K net of mitigated earnings of \$129K.
 - b. Mitigated amount of \$129K was only supported with NPA issued by a certain government agency (effective January 2018 and January 2019) and another government agency (effective April 2019 and October 2019). The employee did not provide the Port with W-2 covering her employment with the two government agencies. In the absence of W-2, there is no assurance of the correctness of the mitigated amount.
 - c. Per Port's admission, the employee did not provide them with documents attesting to the employee's unemployment from February 2013 through January 2018 and January 2019 through April 2019.

For transparency and full disclosure, this type of formal settlement agreement needs to consistently disclose the amount and the term of gross and net back wages and outside earnings mitigated, and incorporate therein a comprehensive liability release provision. Without this liability release provision, Port risked the possibility of Employee S, or her beneficiaries, pursuing further financial demands and litigation on the same termination lawsuit. Therefore, we reiterate our recommendation for a comprehensive settlement agreement disclosing the legal remedies such as amount and terms of gross back wages and mitigation, benefits, interest charges, attorney's fees and costs, and a liability release provision.

Port's Annual Salary Increment System

Under Port's Personnel Rules and Regulations (PRR) and salary increment point system, an *approved performance evaluation report* serves as the basis for whether an employee receives a salary increment or not and for how high the salary increment would be. On performance evaluation alone, the highest a Port employee's salary can increase is up to five sub-steps (or 5%) every year. According to Port's PRR 6.302, salary increments are based on an *annual performance evaluation*, for which the employee is given zero to five points for every performance factor evaluated. According to interim procedures approved by former Port GM in October 2010, employees are eligible to the increment sub-steps that correspond with the total points *their overall performance earned*. PRR 6.302 also states that the salary increment will be granted by the GM's certification (signature) that satisfactory service was rendered for the

performance-rating period preceding such (increment) increase. See Table 2 below for the Port’s Salary Increment Point System.

Table 2: Salary Increment Point System

Total Points	Overall Performance Rating	Sub-Steps
0 – 25	Unsatisfactory	0
26 – 34	Satisfactory (Marginal)	2
35 – 49	Satisfactory	3
50 – 59	Satisfactory (Highly)	4
60 – 65	Outstanding	5

Source: Port Inter-Office Memorandum, October 11, 2010

Deviations from Certain Provisions of Port’s Personnel Rules and Regulations

Highest Number of Incremental Sub-Steps Granted Annually without the PRR Required Performance Evaluations Approved by the Former GM

We reviewed Port’s calculation of the reinstated employees’ back wages during the seven-year employees’ termination period. We found that the Port consistently used the **“5” sub-steps** for Employee S and **“4” sub-steps** for Employee T, which correspond to an “Outstanding” and “Highly Satisfactory” ratings, respectively. The Port’s average calculation methodology resulted in gross back wages amounting to \$537K and \$189K, respectively, which was mathematically correct. Comparatively, another autonomous agency considered **“5” as a rare rating, which means that the employee significantly exceeded expectations.**

We respect that Port’s calculation was based on the understanding that reinstated Employee S and Employee T’s back wages and benefits should be processed as if there was no work interruption. In the Port’s response to OPA questions and during their audit discussion in November 2021, the Port confirmed that the annual increments granted to the employees during their termination periods were based on the **average ratings** of employees’ last three years’ employment at the Port (2010, 2011, and 2012). In the absence of a required annual performance evaluation for every increment period, Port resorted to this average calculation method because management believed that these employees could render a consistently “Outstanding” performance during the seven-year termination period. They explained that the surrounding circumstances are not regular and that Port addressed this issue differently fitted with the prevailing circumstances.

We verified that the annual increments granted for 2013 through 2019 (seven years) were not supported with duly accomplished performance evaluation reports, which need to be approved by (and accountable to) the former GM, in compliance with the Ports PRR 6.302 and 7.010. Based on this PRR provision, without any approved performance evaluation reports, Port would have no valid basis in calculating applicable sub-steps and granting the increments.

In order for the “5” or “4” sub-step annual increments of “Outstanding” or “Highly Satisfactory” ratings to be actionable, the Port prepared all seven Notifications of Personnel Action (NPA) forms in one day upon the employees’ reinstatement, retroactive on the prior years when the increments

were due. The current GM signed these NPAs. After the “5” or “4” sub-step annual salary adjustments from 2012 through 2019, Employee S got an adjusted annual salary of \$118K and Employee T received an adjusted annual salary of \$52K upon their reinstatements. See Table 3.

Table 3: Annual Salary Increments from 2013-2019 per NPAs

NPA #	Effective Date	Pay Grade/Step	Adjusted Annual Salary per NPA
Employee S			
10-20 SI	10/13/12	N-9A	\$ 83,069
11-20 SI	10/13/13	N-10B	\$ 87,307
12-20 SI	10/13/14	N-11C	\$ 91,760
13-20 SI	10/13/15	N-12D	\$ 96,441
28-20	10/1/2016 **	NN-7A	\$ 98,424
14-20 SI	10/13/16	NN-8B	\$ 103,444
15-20 SI	10/13/17	NN-9C	\$ 108,721
29-20	9/16/2018 **	NN-10B	\$ 112,016
16-20 SI	9/16/19	NN-11C	\$ 117,729
Employee T			
320-20	10/13/12	I-6B	\$ 38,671
321-20	10/13/13	I-7B	\$ 40,241
322-20	10/13/14	I-8B	\$ 41,875
323-20	10/13/15	I-9B	\$ 43,575
38-20	10/1/2016 **	II-6C	\$ 44,724
324-20	10/13/16	II-7C	\$ 46,540
325-20	10/13/17	II-8C	\$ 48,430
39-20	9/16/2018 **	II-9B	\$ 49,897
326-20	9/16/19	II-10B	\$ 51,923

** Port-wide pay adjustments

Since annual salary increments are performance-based, a duly approved employee performance evaluation is still needed in compliance with the Port PRR. However, under this situation and in the absence of any provision in the PRR relative to the processing of annual increments for reinstated employees, it is prudent for the management to seek Board’s advice on the appropriate course of action relative to annual increments or seek the Attorney General’s opinion.

We reiterate our previous recommendation for the Port management and the Board to standardize a salary increment process for reinstated employees to include a performance evaluation report approved by the incumbent GM who also approves the NPA. If not feasible, we also recommend that moving forward Port management and the Board should decide on how this PRR requirement on performance-based annual increments for reinstated employees be satisfactorily complied by seeking the Attorney General’s opinion.

Annual Salary Increments Based Partly on Three Prior Year “Outstanding” or “Highly Satisfactory” Ratings not Approved by any GM

During the November 2021 discussions, the Port team confirmed that the Notice of Results of Performance Evaluation Report (NRPER) needs to be signed by the General Manager to signify approval of the employee’s performance evaluation rating and render the corresponding increment actionable.

We refer to the three following sections in Port’s PRR, which specified and explained that the GM has the final say on all salary increments, as follows:

- Employees entitled to an increment increase shall be based on an annual review of performance.
The salary increment will be granted by the GM’s certification (signature) that satisfactory service was rendered for the performance-rating period preceding such increase (PRR 6.302).
- All salary increments will require approval by the General Manager (PRR 7.008).
- A Division Head shall submit a written recommendation to the GM regarding the performance appraisal of every employee. The GM shall make a final performance appraisal accepting or rejecting said recommendation and make the corresponding salary adjustments (PRR 7.010).

We verified employees’ performance evaluation reports for 2010, 2011, and 2012 to determine if these employees got average ratings of “Outstanding” and “Highly Satisfactory”. Our verification and recalculation found that Employees S & T got averages of “**Marginal Satisfactory**” rating or are eligible only of “**2**” **sub-steps** due to the lack of NRPER or NRPER were not signed by the former GM to signify approval of the recommended increments. The recalculated **eligible “2” sub-steps** for Employee S & Employee T is way below compared with the “**5**” or “**4**” **sub-steps** granted by Port. See Table 4.

Table 4: Summary of Performance Evaluations without Former GM Approval

Performance Rating Period Ended	Overall Performance Rating	NRPER Signatory	Incremental Sub-Steps Granted	Eligible Sub-Steps	Remarks
Employee S					
10/12/10	Outstanding	None	5	0	No NRPER. With NPA signed by the former GM.
10/12/11	Cannot be determined	None	5	5	No PER & NRPER provided. With certification of fire loss.
10/12/12	Outstanding	None	5	0	NRPER & NPA not signed by the former GM.
Average			5	1.7	

Performance Rating Period Ended	Overall Performance Rating	NRPER Signatory	Incremental Sub-Steps Granted	Eligible Sub-Steps	Remarks
Employee T					
10/12/10	Marginal SAT	None	4	0	No NRPER. With NPA signed by former GM.
10/12/11	Outstanding	Former GM	5	5	
10/12/12	Highly SAT	None	4	0	NRPER and NPA not signed by the former GM.
Average			4	1.7	

The recalculated **eligible “2” sub-steps** for Employee S & Employee T as opposed to **“5” or “4” sub-steps** granted by Port resulted in discrepancies totaling \$105K. This discrepancy could have a financial impact on the Port.

Discrepancies in Using the “Outstanding” and “Highly Satisfactory” ratings (“5” or “4” sub-steps) Instead of Marginal Satisfactory Rating (“2” sub-steps) due to Absence of or NRPER not Approved by former GM

We acknowledge Port management’s efforts to provide reinstated Employee S and Employee T with all the expected benefits **“to make the employee whole”** as if they were not terminated. However, the audit’s calculation of the average rating for the three prior years resulted in a **“Marginal Satisfactory”** rating (“2” sub-step) as opposed to “Outstanding” or “Highly Satisfactory” (“5” or “4” sub-steps) in Port’s calculation of annual increments. The Marginal Satisfactory rating for which the employees were eligible stemmed from the absence of **approved performance evaluation documents** required per Ports’ PRR Section 6.302, 7.008, and 7.010. Please see Table 4 above.

The Port explained that since the employees were deprived to work with Port to prove the consistency of their “Outstanding” performance ratings, they should not be penalized by receiving a lower rating due to the absence of approval by the former GM. Thus, the Port used the “Outstanding” or “Highly Satisfactory” rating equivalent to “5” or “4” sub-steps. In Part A, Port management responded to this similar finding that there was no written letter denying the employee increment, therefore increments for 2012 have been effectuated. It further stated that leaving a performance evaluation unsigned should not be akin to rejecting it. The response is the present Port management’s interpretation of its PRR. PRR 7.010 specifically states that the **Division Head** shall submit a written recommendation on an employee’s performance appraisal to the GM, who will accept or reject said recommendation and make the corresponding salary adjustment. Since the auditors deal with evidentiary documents, an absence of GM’s signature on the NRPER could also be interpreted as **unapproved**. If the approving officer intends to approve the employee increment, he/she should have affixed his/her signature on the NRPER to signify his approval of the employee’s eligibility for a salary increment. Therefore, the employee might not be eligible for an increment of “5” or “4” sub-steps.

Due to the deviation from the provisions per PRR 6.302, 7.008, and 7.010, by not using the eligible “2” the incremental sub-steps, this resulted to discrepancies in paid back wages approximately totaling to \$105K, which could have a financial impact to Port. This calculation excluded the pay adjustments in 2016 and 2018, as those were not performance-based increments. See Tables 5A and 5B for details.

Table 5A: What Port Granted vs. Eligible Marginal Satisfactory Rate - Employee S

Effective Date of Salary Increment	Port's Assumed "Outstanding"			Eligible "Marginal Satisfactory"			Variance
	★★★★★★			★★★☆☆☆			
	Pay Grade /Step	Annual Salary	Hourly Rate	Pay Grade /Step	Annual Salary	Hourly Rate	
10/13/2012	N-9A	\$83,069	\$39.94	N-8B	\$80,626	\$38.76	\$2,443
10/13/2013	N-10B	\$87,307	\$41.97	N-8D	\$82,247	\$39.54	\$5,060
10/13/2014	N-11C	\$91,760	\$44.12	N-9B	\$83,900	\$40.34	\$7,860
10/13/2015	N-12D	\$96,441	\$46.37	N-9D	\$85,586	\$41.15	\$10,855
10/13/2016	NN-8B	\$103,444	\$49.73	NN-4C	\$89,102	\$42.84	\$14,342
10/13/2017	NN-9C	\$108,721	\$52.27	NN-5A	\$90,893	\$43.70	\$17,828
9/16/2019	NN-11C	\$117,729	\$56.60	NN-6B	\$95,529	\$45.93	\$22,200
Total		\$688,471			\$607,883		\$80,588

Table 5B: What Port Granted vs. Eligible Marginal Satisfactory - Employee T

Effective Date of Salary Increment	Port's Assumed "Highly Satisfactory"			Eligible "Marginal Satisfactory"			Variance
	★★★★★☆☆			★★★☆☆☆			
	Pay Grade /Step	Annual Salary	Hourly Rate	Pay Grade /Step	Annual Salary	Hourly Rate	
10/13/2012	I-6B	\$38,671	\$18.59	I-5D	\$37,909	\$18.23	\$762
10/13/2013	I-7B	\$40,241	\$19.35	I-6B	\$38,671	\$18.59	\$1,570
10/13/2014	I-8B	\$41,875	\$20.13	I-6D	\$39,448	\$18.97	\$2,427
10/13/2015	I-9B	\$43,575	\$20.95	I-7B	\$40,241	\$19.35	\$3,334
10/13/2016	II-7C	\$46,540	\$22.38	II-5A	\$42,132	\$20.26	\$4,408
10/13/2017	II-8C	\$48,430	\$23.28	II-5C	\$42,979	\$20.66	\$5,451
9/16/2019	II-10B	\$51,923	\$24.96	II-6D	\$45,171	\$21.72	\$6,752
Total		\$311,255			\$286,551		\$24,704
Overall Total							\$105,292

Sources: Notifications of Personnel Actions; Port’s Pay Plan.

Although we acknowledge Port’s justification for its action as mentioned in the preceding paragraphs of this report, similarly, we refer the discrepancies for Port management’s review on the financial impact of such deviation from PRR and moving forward should a similar situation occur.

Conflicting Notifications of Personnel Action

The \$189K back wages (net of offset) was arrived at by using hourly rates, which did not conform to the hourly rates reflected on the supporting NPA's provided. The Port explained that their subsequent calculations, which were made upon the employees' reinstatements, were guided by the amounts reflected in the Settlement Agreement as agreed between the employees and the Port representatives. Human Resources Department prepared the NPAs upon the employees' reinstatement based on the agreed sub-steps for increment in accordance with the Pay Schedule. Thus, NPA hourly rates would potentially be discrepant (different) against the hourly rates used in employees' calculations for the Settlement Agreement. Since settlement agreements would legally bind and obligate parties for compliance, the back wages amounts should be stated therein reviewed and validated by both parties.

NPAs are official actionable documents, which support the Pay Grade/Scale and the hourly rate that should be paid to employees, thus must reflect accurate pay rates. With the conflicting hourly rates between Port's calculation and the actual NPAs provided, we could not determine the hourly rates that would be appropriately applied to employees' subsequent years' increments. We refer this matter to Port management for review and final determination of appropriate applicable NPAs. See Table 6.

Table 6: Discrepancies in Back Wages Hourly Rate versus Supporting NPAs

Pay Period	No. of Hours	Gross Back Wages Paid	Rate Per Hour	Applicable NPA	Effectivity Date	Rate Per Hour
10/19/13 to 10/18/14	2160	\$ 41,364	\$ 19.15	321-20	10/13/13	\$ 19.35
11/01/14 to 10/17/15	2080	\$ 41,059	\$ 19.74	322-20	10/13/14	\$ 20.13
10/31/15 to 9/17/16	1920	\$ 39,033	\$ 20.33	323-20	10/13/15	\$ 20.95
10/1/16 to 10/15/16	160	\$ 3,339	\$ 20.87	38-20	10/1/16	\$ 21.50
10/28/17 to 9/15/18	1920	\$ 42,528	\$ 22.15	325-20	10/13/17	\$ 23.28
9/29/18 to 9/15/19	2080	\$ 47,465	\$ 22.82	39-20	9/16/18	\$ 23.99

Deficiencies in Port Back Wages Calculation Resulting in Potential Overpayments

Our review and recalculations of back wages paid to Employee S and Employee T found potential overpayments of approximately \$22K. These were either due to: a) increments prior to termination included in paid back wages, and b) questionable and unaccounted additional back wages paid. See Table 7.

Table 7: Breakdown of Overpayments

Cause of Overpayments	Employee S	Employee T	Total	Remarks
Increments Due Prior to Termination	\$1,363	\$576	\$1,939	Performance evaluation documents not signed by former GM
Questionable and Unaccounted Additional Back Wages Paid	-	\$19,565	\$19,565	Amount added to tally and balance the amount reflected in the Settlement Agreement
Total	\$1,363	\$20,141	\$21,504	

Unapproved Increments Prior to Employees Terminations Included in the Paid Back Wages

Back wages paid to Employee S and Employee T included increments totaling \$1,939 prior to the employees' terminations (10/07/12-12/12/12 and 10/07/12-02/23/13). These increments were based on NPAs prepared in 2019 and 2020, signed by the current GM. According to Port's responses, the former GM did not sign the 2013 prepared NPAs thus were replaced. The NRPER, which supported the 2013 NPAs were, likewise not signed by the former GM. The absence of GM signature apparently indicated non-approval; as such, there was no valid basis for granting the employees increments with the highest number of incremental sub-step of 5% or 4%, respectively. Besides, per Civil Service Commission–Decision and Judgment, the employees shall be compensated for all the time **following their December 2012 and February 2013 terminations, respectively until the dates they are reinstated.**

Per Port's response to OPA questions, management stated that the employees did not receive the increments that were due to them prior to their termination. See Table 8 below for the details of the old and revised NPAs.

Table 8: Comparison of Old and Replacement NPA

Particulars	Employee S	Employee T	Total Prior Increment	Remarks
Terminated	12/18/2012	2/25/2013		
Reinstated	11/25/2019	1/06/2020		
Old NPA Prepared	665-13 (8/20/2013)	655-13 (8/16/2013)		NRPERs and NPAs were not signed by previous GM.
Effective Date	10/13/2012	10/13/2012		
Salary Per Hour	\$39.94	\$18.59		
New NPA Prepared	10-20SI (12/10/2019)	320-20 SI (1/6/2020)		Signed by the Deputy GM.
Effective Date	10/13/2012	10/13/2012		
Salary Per Hour	\$39.94	\$18.59		
Prior Year Rate	\$38.00	\$17.87		
Increment	\$1.94	\$.72		
Increment Paid	\$3.79	\$.72		Employee S- Inclusive of increment effective 10/13/11 for \$1.85 and \$1.94 effective 10/13/12
Increment Period Paid	10/07/2012 to 12/15/2012	10/07/2012 to 2/23/2013		Prior to terminations in Dec. 2012 and Feb. 2013
Total	\$1,363	\$576	\$1,939	

For Employee S, the increment of \$1.85 or an equivalent total of \$666 (360 hours) effective October 13, 2011, was also included in the back wages. Port management stated that the employee was also not paid with the 2011 increments since the performance evaluation submitted for signature was held and not signed by the former GM. We were unable to verify the evaluation

documents as these were covered by a certification of fire loss for documents for FY 2010 and FY 2011.

Please note that the increments effective 2011, 2012, and each annual increment added to existing salaries had a **domino effect** on subsequent years' salary increments and pay adjustments. Adjusted NPA's became the basis for subsequent salary changes – salary increments for 2012 through 2017, pay adjustments in 2016 and 2018, and the 2019 salary increment.

Questionable and Unaccounted Additional Back Wages Paid – Employee T

The *Settlement Agreement* executed on December 2019 disclosed back wages of \$189K after set-off. Our verification of Port's calculation found that the actual gross back wages are \$318K, calculated from the net amount of \$189K plus mitigation of \$129K. The gross back wages of \$318K was over by \$20K. This amount labeled as "**non-tax item**" was added to Port's original calculated amount of \$299K. This item could not be identified with any pay period in Port's calculation. In Port's response, it stated that the item was miscategorized and part of the settlement amount.

In Port's walkthrough of their reinstatement process, reinstated employees provide their calculations of back wages based on their research and submit their requested amount of back wages upon negotiation. Such amount will be reflected in the *Settlement Agreement*, which has to be paid by the Port. Upon employees' reinstatement, the Port will prepare its independent calculation then process an NPA.

Income Tax Withholding Not Deducted from Paid Back Wages

Net back wages totaling \$189K, which were paid to Employee T via three installments between January 2020 and January 2021, were not deducted with payroll tax, specifically "income tax withholding". The *Settlement Agreement* provided that the first installment should only be deducted with payroll taxes. Payroll taxes include among others, federal income tax, Medicare, etc. The back wages were deducted with Medicare tax and retirement contributions. This non-deduction of income tax withholding was based on the employee's request in January 2021 for the third installment due for the month. There were no requests for the other two installments totaling \$136K paid in 2020.

Per Port's reply to OPA inquiry, the employee requested not to tax the lump sum amount. During the November 2021 discussion, Port Controller stated that the payment of income tax is the responsibility of the employee.

In Form W-4 (Employees Withholding Allowance Certificate), if the employee meets the requirement for tax exemption from federal income tax withholding, the employee can claim exemption on IRS Form –W-4. The employee's W-4 form for 2020 (2019 form altered to 2020) was not marked that the employee was "**Exempt**".

Per Internal Revenue Regulations Employer & Employee Responsibilities, it stated that employer and employee hold the responsibility for collecting and remitting withholding taxes to the Internal

Revenue Service (IRS). In cases where an employer does not do this, or where an employee is self-employed, it is the responsibility of the employee to pay these withholding taxes.

The IRS Code also stated that employers must report income and employment taxes withheld from their employees on an Employer's Quarterly Federal Tax Return (Form 941) and deposit these taxes in full to an authorized bank or financial institution pursuant to Federal Tax Deposit Requirements. Employers who do not comply with the employment tax laws may be subject to criminal and civil sanctions for willfully failing to pay employment taxes.

Other Matters

Although not directly related to our audit objectives, we became aware of other concerns that warrant Port's attention.

Potential Violation on Retroactive Pay Raises

The Port revised the NPAs prepared in August 2013 for the annual increments of Employee S and Employee T effective October 2012. These increments were due **prior to the employees' terminations in December 2012**. The revised (new) NPAs were prepared and signed by the current GM in 2019 and 2020 and were effected **retroactive October 2012**. These increments were retroacted seven (7) and eight (8) years after the increments were due. These new NPAs replaced the NPAs prepared in 2013 because the former GM did not sign the evaluation reports. See Table 9.

Table 9: Replacement NPAs with Retroactive Effect

Document Details	Employee S	Employee T
Salary Prior to Increment	\$79,037	\$37,162
Old Unsigned NPA	665-13	655-13
Date Prepared	8/20/2013	8/16/2013
Effective Date	10/13/2012	10/13/2012
Updated Salary	\$83,069	\$38,671
New Revised NPA	10-20 SI	320-20 SI
Date Prepared	12/10/2019	1/6/2020
Effective Date	10/13/2012	10/13/2012
Updated Salary	\$83,069	\$38,671
Increment	\$4,032	\$1,509

In the Attorney General of Guam's (AG) opinion on issued in November 2021, he cited the following references relative to retroactive pay raises:

- **4 GCA §2103.14 - Retroactive Pay**
No **unclassified employee** or officer of the Government of Guam may receive a retroactive pay increase **unless specifically authorized by statute; and**
- **4 GCA §6218.1 - Prohibition on Retroactive Pay Raises**
Whenever a **classified or unclassified employee** of the GovGuam including all departments, agencies, and instrumentalities whether or not autonomous, receives an increase in pay resulting from *step increase*, pay range increase, promotion, or *any other*

cause, such increase in pay **shall not be retroactive from the date of its authorization, unless so specified by law.**

In his conclusion, he stated that unless authorized by statute and regardless of justification, **Government of Guam employees are prohibited from receiving salary increases that are paid retroactively from the date of authorization.** Salary increments based upon performances can only be paid prospectively, upon authorization date, and not retroactive from any date prior. Any retroactive payment is prohibited by Guam law.

We refer this matter to the Port management for justification. We excluded the retroactive nature of annual increments during the employees' termination period, as these will be consolidated in the next report series depending upon the opinion of the AG.

Pay Raise Prior to End of Freeze Period Potentially Violated the Freeze Increment Mandate

P.L. 34-116, Chapter 13, Section 3 mandated a freeze on all salary increments, promotions, reclassifications, merit bonuses, and any other upward pay adjustments to take effect from October 1, 2018, through September 30, 2019. The law further specified that the payment of increments and merit bonuses *must not be retroactively applied.*

Four days after the public law passed a pay raise freeze, on August 24, 2018, Port passed board Resolution No. 2018-05 on August 28, 2018, to adopt an updated pay plan that would result in an agency-wide pay adjustment (pay raise). The updated pay schedule has to be implemented in Fiscal Year 2018 (effective October 1, 2017). The employees received salary increments effective October 13, 2017, up to September 15, 2018. With the majority of Port employees at risk of not getting their annual salary increment, Port implemented an agency-wide pay adjustment to take effect **on September 16, 2018** – two weeks before the statutory freeze started on October 1, 2018.

One year after the agency-wide pay adjustment, Port gave Employee S and T salary increments to take effect on **September 16, 2019**, two weeks before the statutory freeze ended on September 30, 2019. To authorize this salary increment is an apparent violation of P.L. 34-116:13:3. This resulted in an overpayment of approximately \$400 to Employee S and Employee T.

Per the Attorney General's opinion issued in November 2021, he stated that because of the salary increment freeze imposed by **P.L. 34-116 throughout the entirety of FY 2019**, no pay increase must be given for any reason. See Figure 2 for a visual of what Port did following the pay raise freeze.

Figure 2: What Port Did Following the Pay Raise Freeze Mandate



Sources: P.L. 34-116:13:3; Port Board Resolution No. 2018-05; Employee S & T’s NPAs.

Granted Pay Raise Prior to End of Freeze Period Could Indicate an Agency-Wide Overpayment of Increments

An overpayment of \$400 to two employees may appear minimal. However, the cumulative financial impact of Port’s action of granting increments within the freeze period could be significant depending on the number of employees involved. Calculating the potential amount of these overpayments to other employees is not covered in our audit scope. We suggest that Port management revisit the potential effect of such action in terms of salary overpayment agency-wide. We recommend that Port management review its actions in granting increment during the freeze increment period.

Appearance of Conflict of Interest

The Port’s incumbent Deputy General Manager (DGM) served as the Chairman of the Board of the Civil Service Commission (CSC) from 2003 to 2019, until he transferred to the Port of Authority of Guam in December 2019. As Chairman of the CSC Board of Commissioners, he signed the CSC Decisions and Judgments of the appeal cases of Employees S and T between 2014 and 2019. See Table 10.

The CSC Board Chairman joined the Port Authority of Guam in December 2019 as Deputy General Manager for Finance and Administration. From then on, he signed the Settlement Agreement and NPAs for Employee T’s reinstatement and annual salary increments from 2012 to 2019, which were all prepared in January 2020. See Table 10.

Table 10: Documents Signed by Deputy General Manager

CSC Documents		Port Reinstatement Documents	
Document Type	Date Signed	Document Type	Date Signed
Employee S			
Decision & Judgment	3/24/2015		
Decision & Judgment	11/7/2019		
Employee T			
Decision & Judgment	9/30/2014	Settlement Agreement	12/23/2019
Stipulated Judgment of Settlement	12/30/2019	Reinstatement NPA	1/6/2020
		2012 Salary Increment NPA	1/6/2020
		2013 Salary Increment NPA	1/6/2020
		2014 Salary Increment NPA	1/6/2020
		2015 Salary Increment NPA	1/6/2020
		2016 Salary Increment NPA	1/6/2020
		2016 Pay Adjustment NPA	1/6/2020
		2017 Salary Increment NPA	1/6/2020
		2018 Pay Adjustment NPA	1/6/2020
		2019 Salary Increment NPA	1/6/2020

With the incumbent Deputy GM’s participation in the CSC - Appeal Case Judgment Promulgation and signing of Port documents related to the employees’ reinstatement, these portrayed an **appearance of a conflict of interest**. Although the incumbent DGM does not have a financial interest in his official actions and is he not related to the reinstated employees, as declared by the Port GM, we refer to the applicable provision of 4 GCA Chapter 15, Standard of Conduct for Elected Officers, Appointed Officers, and Public Employees of the Government of Guam §15210- Restrictions on Post Employment. It reads:

“No former employee shall, within twelve (12) months after termination from employment, assist any person or business, or act in a representative capacity for a fee or other consideration, on matters involving official action by the particular territorial agency with which the employee had actually served”.

As the former Chairman of the CSC, the incumbent DGM rendered the decisions directly related to the cases filed with CSC by the Port employees. Therefore, it would have been prudent for the DGM to recuse himself from participating in Port actions relative to the employees’ reinstatements. We refer this matter for Port management’s review.

Conclusion and Recommendations

Our performance audit of the back wages of two reinstated Port employees found that Port's reinstatements of Employee S & Employee T were generally made in accordance with administrative and judicial review judgments and orders. The legal remedies stipulated in the Agreement to Satisfy Judgment and Settlement Agreement were likewise generally complied by the Port. The Port paid a total of \$1.0 million (M) for back wages, Medicare tax, retirement contribution, and attorney's fees, and legal costs for the two employees.

However, in the Port's reinstatement processes and execution of legal remedies, we found some lapses such as: a) deficiencies in documentation b) deviations from certain provisions of Port PRR and internal policies, c) non-adherence with Ports Personnel Rules and Regulation, d) deficiencies in calculations resulting to discrepancies of \$105K and overpayments of \$22K, e) conflicting NPAs, and f) non-deduction of withholding tax on paid back wages. We also found other matters which we need to bring to Port management's attention relative to retroactive pay raises, pay raise during increment freeze period, and appearance of conflict of interest.

Based on Civil Service Commission Decision and Judgment, Employees S and T have to be reinstated and be fully compensated to include salaries and all benefits, under the Guam law, for all the time following their 2012 termination until the date they are reinstated. We acknowledged and commend the Port's adherence to the CSC decision with the intention "to make the employee whole" and processed salaries and benefits as if there was no work interruption. However, in the implementation processes and execution of legal remedies, Port also needs to comply with its Personnel Rules and Regulations specifically on performance-based annual increments. Certain deviations from PRR and other internal policies resulted in discrepancies of approximately \$105K and potential overpayments of \$22K, which could have potential financial impact on the Port.

In the absence of any provision in the PRR relative to the processing of annual increments for reinstated employees, it is prudent for the management to seek Board's advice on the appropriate course of action relative to annual increments or seek the Attorney General's opinion. Moving forward Port management and the Board should decide on how this PRR requirement on annual increments of reinstated employees be satisfactorily complied.

As a result of our audit, we recommended the Port GM, management, and/or board:

1. Consistently seek Board's ratification via a Resolution specifying the legal remedies such as: composition of the total back wages, interest, and legal fees and costs.
2. Ensure the execution of formal & comprehensive settlement agreements disclosing therein the legal remedies such as amount and terms of gross and net back wages, mitigation, other benefits, interest charges, legal costs, and a liability release provision.
3. Standardize a salary increment process for reinstated employees to include a performance evaluation report to be signed by the incumbent GM.
4. If recommendation #3 is not feasible, we recommend that moving forward Port management and the Board should decide on how this PRR requirement on annual

increments for reinstated employees be satisfactorily complied by seeking the Attorney General's opinion.

5. Adhere to the restrictions on retroactive pay raises on performance-based increments.
6. Review the following:
 - a) Port actions in granting increments during the freeze increment period;
 - b) Port policy on conflict of interest.

Classification of Monetary Amounts

Finding Description		Questioned Costs	Potential Savings	Unrealized Revenues	Other Financial Impacts	Total Financial Impacts
1.	Legal Remedies Paid without Ratification by a Resolution	\$ -	\$ -	\$ -	\$ -	\$ -
2.	Inconsistencies and Deficiencies in Agreement to Satisfy Judgement and Settlement Agreement	\$ -	\$ -	\$ -	\$ -	\$ -
3.	Deviations from certain Provisions of Port Personnel Rules and Regulations:	\$ -	\$ -	\$ -	\$ -	\$ -
	a. Highest Number of Incremental sub-steps Granted Annually without Performance Evaluations Approved by the Former GM	\$ -	\$ -	\$ -	\$ -	\$ -
	b. Annual salary increments based partly on three prior years' "Outstanding" or "Highly Satisfactory" ratings not approved by any General Manager (GM)	\$ -	\$ -	\$ -	\$ -	\$ -

Classification of Monetary Amounts

	Finding Description	Questioned Costs	Potential Savings	Unrealized Revenues	Other Financial Impacts	Total Financial Impacts
	c. Discrepancies in using the “Outstanding” and “Highly SAT” ratings instead of eligible “Marginal Satisfactory” rating due to the absence of or NRPER not approved by former GM	\$ -	\$ -	\$ -	\$ 105,252	\$ 105,252
	d. Conflicting Notifications of Personnel Actions	\$ -	\$ -	\$ -	\$ -	\$ -
4	Deficiencies in Port back wages calculations resulting to potential overpayments					
	a. Unapproved Increments due Prior to Employees terminations Included in Paid Back Wages	\$ 1,939	\$ -	\$ -	\$ -	\$ 1,939
	b. Questionable and Unaccounted Additional Back Wages Paid	\$ 19,565	\$ -	\$ -	\$ -	\$ 19,565
5	Income Tax Withholding not Deducted from Paid Back Wages	\$ -	\$ -	\$ -	\$ -	\$ -

Classification of Monetary Amounts

Finding Description		Questioned Costs	Potential Savings	Unrealized Revenues	Other Financial Impacts	Total Financial Impacts
6	Other Matters					
	a. Potential Violation on Retroactive Pay Raises	\$ -	\$ -	\$ -	\$ -	\$ -
	b. Pay Raise Prior to End of Freeze Period Potentially Violated the Freeze Increment Mandate	\$ -	\$ -	\$ -	\$ 398	\$ 398
	c. Appearance of Conflict of Interest	\$ -	\$ -	\$ -	\$ -	\$ -
	Total	\$ 21,504	\$ -	\$ -	\$ 105,650	\$ 127,154

Management Response and OPA Reply

In November 2021, our office transmitted to the Port General Manager, the Port Back Wages Part-B preliminary findings to discuss our findings, recommendation, and clarification of some issues that need to be addressed. No discussion nor exit conference took place based on Port management's decision.

In December 2021, we provided an updated final report to Port's GM for him to provide OPA with their official management response. In its official management response, the GM disagreed with our audit finding relative to the Appearance of Conflict of Interest involving the Deputy General Manager.

Port's Response: The Deputy GM does not have a conflict of interest because he has no personal or financial interest gained in his involvement with the personnel matters in his present capacity at the Port. We are enclosing the Deputy GM's declaration under penalty of perjury that he did not have a financial gain or any consideration as a result of his participation in these matters cited in the report.

OPA Reply: As stated in our report, we refer to the Port management §15210- of GCA Chapter 15 on Restrictions on Post Employment.

See Appendix 5 for Port management's complete response and the Deputy GM's Declaration relative to the issue on Potential Conflict of Interest.

The legislation creating the Office of Public Accountability requires agencies to prepare a corrective action plan to implement audit recommendations, to document the progress of implementing the recommendation, and to endeavor to complete implementation of the recommendations no later than the beginning of the next fiscal year. We will contact PAG to provide the target date and title of the official(s) responsible for implementing the recommendations.

We greatly appreciate the cooperation given to us by the staff and management of PAG this audit.

OFFICE OF PUBLIC ACCOUNTABILITY



Benjamin J.F. Cruz
Public Auditor

Appendix 1:**Objective, Scope, & Methodology**

Objective

To determine whether Port’s settlements, or legal remedies, with reinstated employees were properly accounted for and paid in accordance with applicable laws, regulations, and administrative and judicial review judgments.

Scope

Our audit scope covered court orders and judgments, Port documents, and other relevant documents and evidence that supported Port’s calculations and payments to Employees S and T’s legal remedies. The period covered for this audit engagement is from October 1, 2010 (FY 2011) through April 30, 2021 (part of FY 2021).

Part B of our audit series focuses on the audit results of two of the seven reinstated employees – “Employee S” and “Employee T”. This covered the court orders and judgments, Port documents, and other documents relevant to Port’s calculations and payments to Employee S & T’s legal remedies. The period covered is from October 2010 through April 2021.

The results of our audit of the remaining four employee’s settlements will be issued in the next series of our audit reports.

Methodology

To accomplish our objective, we performed the following:

- Identified, analyzed, and determined compliance with applicable CSC and other court orders and judgments, laws, rules and regulations, and internal policies.
- Identified and analyzed prior audits.
- Met with Port representatives to review the Port’s reinstatement processes, back wages calculation method and other relevant issues on performance evaluations, and salary increments to determine the consistency of application for the two employees covered in this audit.
- Identified and analyzed all documents relevant to Port’s calculations and payments.
- Reviewed Port’s calculations and payments and verified against supporting documents and other evidence.
- Met with Port management to discuss and clarify responses to audit preliminary questions and updated the audit findings.

We conducted this performance audit in accordance with generally accepted government auditing standards issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Prior Audit Coverage

OPA Report No. 21-03, Port Authority of Guam Back Wages Series, Part A

Our performance audit of the back wages of the first of nine reinstated Port Authority of Guam (Port) employees – “Employee Q” – found significant deficiencies in the basis of Port’s calculations for back wages, Medicare tax, retirement contribution, and interest charge that resulted in overpayments of at least \$96 thousand (K) in back wages and \$18K in interest for a total of \$114K. While Port’s legal remedies with Employee Q were generally made in accordance with administrative and judicial review judgments and orders, we found instances of potential noncompliance with applicable laws, regulations, and internal policies, as well as lapses in Port’s internal processes.

Specifically, we found:

- Port adhered to certain terms and conditions of Employee Q’s that were not required by the Civil Service Commission (CSC) or the courts’ judgments, such that:
 - The highest number of incremental sub-steps were granted based partly on two (2) prior years’ “Outstanding” performance evaluation ratings that were not approved by the former (or any) General Manager (GM); and
 - A 6% interest charge was paid to Employee Q without any court order requirement, negotiated terms, and proper calculation.
- Successor management approved salary increments that their predecessors did not approve of themselves;
- Legal remedies were executed without seeking the Board of Directors’ (Board) ratification by resolution and without a formal agreement and liability release until after the final payment in May 2020; and
- Different legal opinions resulted in delay and certain unorganized remedial actions.

We became aware of other matters not related to our audit objective that warrant Port’s, and possibly the Guam Legislature’s, attention – i.e., the uniformity of existing employees’ anniversary dates and no caps on Port’s salary increments. As a result of our audit, we recommended the following:

- The GM and the Board standardize a salary increment process for back wages to include a required performance evaluation report (of the sort) accountable to the incumbent GM who approves the number of sub-steps on the personnel action forms.
- The GM seek the Board’s ratification, via board resolution, specifying the composition of total back wages and interest paid to Employee Q.
- The GM execute a comprehensive formal agreement that includes (1) the purpose, amounts, and terms of what Port paid for Employee Q’s back wages, benefits, attorney fees, and interest charge; (2) a liability release provision; and (3) the signatures of the relevant parties and witness.

Prior Audit Coverage

- The GM and the Board reconsider their practice of unifying employees' increment anniversary dates moving forward.
- The Board comply with Guam Code and provide parity to ratepayers and taxpayers by incorporating in its PRR the relative (or similar) provisions of 4 GCA Chapter 6 §6202.

Civil Service Commission Decision for Employee S



BEFORE THE
GUAM CIVIL SERVICE COMMISSION
BOARD OF COMMISSIONERS



IN THE MATTER OF:

[REDACTED]

Employee,

vs.

PORT AUTHORITY OF GUAM,
Management.

ADVERSE ACTION APPEAL
CASE NO. [REDACTED]

DECISION & JUDGMENT

INTRODUCTION

This matter came before the Civil Service Commission for a hearing on the merits on the following dates:

October 7, 8, 9, 14, 15, 21, 22, 23, 29 and November 5, 2014.

Present at the hearings were [REDACTED] who was represented by Attorney [REDACTED]. Present for Management Port Authority of Guam was Attorney [REDACTED] and General Manager [REDACTED].

The Commission determined by a vote of 4-3 that the Notices of Proposed and Final Adverse Action were procedurally defective. Further, the Commission determined by a vote of 5-2 that Management had failed to meet its burden of proof.

JURISDICTION

The Civil Service Commission has jurisdiction over this matter pursuant to 4 GCA § 4401, *et seq.*, and the Port Authority of Guam ("PAG") Personnel Rules and Regulations.

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Civil Service Commission Decision for Employee S

FACTS

1. On December 5, 2012, [REDACTED] was served a Proposed Notice of Adverse Action.
2. On December 9, 2012, [REDACTED] submitted her written response to the Proposed Notice of Adverse action.
3. On December 18, 2012, [REDACTED] was served a Final Notice of Adverse Action thus terminating her employment with PAG.
4. On October 7, 8, 9, 14, 15, 21, 22, 23, and 29, 2014, the parties put forth their respective cases.
5. On November 5, 2014, the Commission deliberated and based on the facts proven determined the PAG failed to meet its burden of proof that action taken against [REDACTED] was proper.

STANDARD OF PROOF

Employee contended that the “clear and convincing” standard of proof under § 4407(a) was appropriate. Management contended that the more deferential “substantial evidence” standard under § 4407(c) should be applied, since PAG argued the alleged actions of [REDACTED] could be a crime. The contention over the correct standard of proof was the most important legal issue in the present case.

In *Michael P. Atiogue v. Attorney General of Guam*, Adverse Action Appeal CY89-AA01, May 18, 1989, the Commission found it did not have to accept Management’s contention that the alleged activity that resulted in termination was a crime. In *Joseph B. Cruz v. Department of Land Management*, Adverse Action Appeal CY90-AA12, Feb. 13, 1992, the Commission held that the substantial evidence standard of proof was proper where the employee had actually had criminal charges filed against them by prosecutors. In *Kenneth Terrell v. GIAA*, Adverse Action Appeal 0508-AA24, March 26, 2007, the Commission ruled that where “no facts presented whether a criminal charge was filed or whether one is pending... the standard of proof... shall be on the government to show clearly and convincingly that the action taken by Management was correct.”

Civil Service Commission Decision for Employee S

1 Prior to 2002, the standard of proof under § 4407(a) was preponderance of the evidence;
2 however, Public Law No. 26-88 changed that standard to clear and convincing evidence on May
3 17, 2002. Section 1 of that P.L. No. 26-88 reads, in relevant part:

4 *I Liheslaturan Guahan* finds that the standard of proof utilized by the
5 Commission in any adverse action appeal requires that management only
6 show “by a preponderance of the evidence” that its action was correct.
7 This standard of proof favors management to the detriment of the
8 employee appealing management’s action. *I Liheslaturan Guahan* finds
9 that there is a need to “level the playing field” by requiring a greater
10 burden of proof. (Page 2, Lines 5-10).

11 Thus, it is apparent that *I Liheslaturan Guahan* determined that the clear and convincing
12 standard of proof was appropriate in most cases for adequately protecting the due process rights
13 of employees. In *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 41, the Supreme Court of
14 Guam held that “clear and convincing” evidence was evidence that “must be of extraordinary
15 persuasiveness” meaning that it “is so clear, direct, weighty, and convincing as to enable the trier
16 of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.”

17 Consistent with its prior cases, the Commission finds here that the clear and convincing
18 evidence standard applies in the absence of actual criminal charges filed. We note pursuant to,
19 *e.g.*, 8 GCA § 45.20 that the standard for prosecutors in securing a criminal indictment is
20 probable cause. From the findings of *I Liheslaturan Guahan* it appears inconsistent with
21 legislative intent to lessen the burden of proof by management from clear and convincing
22 evidence to substantial evidence without a successful probable cause showing that a crime may
23 have been committed. Commissioners are selected based upon their knowledge, experience, and
24 expertise in labor and employment-related matters, not their expertise with criminal law.
25 Requiring this quasi-judicial body to interpret criminal statutes and substitute our own judgment
in criminal matters for those of professional prosecutors and Superior Court judges seems
beyond our purview.

Civil Service Commission Decision for Employee S

CONCLUSION

Management has failed to meet the burden of clear and convincing evidence required. Therefore, the adverse action taken against [REDACTED] is NULL AND VOID.

The PAG is hereby ORDERED to immediately reinstate [REDACTED] to her prior position of employment. The PAG is FURTHER ORDERED to fully compensate [REDACTED] for all the time following her termination on [REDACTED] until the date that she is reinstated, including, but not limited to, salary and benefits, sick and annual leave, retirement benefits, and all other benefits due and owed to [REDACTED] under Guam law. Finally, the PAG is ORDERED to pay the reasonable attorney's fees and costs incurred by [REDACTED] during this appeal.

SO ADJUDGED THIS 24th day of March 2015.

Luis R. Baza

LUIS R. BAZA
Chairman

[REDACTED]

Vice-Chairman

[REDACTED]

Commissioner

Commissioner

[REDACTED]

Commissioner

Commissioner

[REDACTED]

Commissioner

[REDACTED]

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Civil Service Commission Decision for Employee S

67164-1867

CIVIL SERVICE COMMISSION

10:37:22 a.m. 11-08-2019

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BEFORE THE
GUAM CIVIL SERVICE COMMISSION
BOARD OF COMMISSIONERS



IN THE MATTER OF:

[REDACTED]

Employee,

vs.

PORT AUTHORITY OF GUAM,

Management.

ADVERSE ACTION APPEAL

CASE NO.: [REDACTED]

DECISION AND JUDGMENT

This matter came before the Commission October 10, 2019, for the Civil Service Commission (Commission) to hear the recommendations of the Administrative Law Judge (ALJ). Commissioners present were Chairman [REDACTED], Vice-Chairman [REDACTED], [REDACTED] Commissioner [REDACTED], [REDACTED] Commissioner [REDACTED] and Commissioner [REDACTED]. Employee was present with her counsel, [REDACTED]. Management was represented by Port General Manager, [REDACTED] and Attorney [REDACTED].

[REDACTED] read his recommendations to the Commission.

DECISION AND ORDER
[REDACTED] vs. Port Authority of Guam
Adverse Action Appeal Case No.: [REDACTED]

Page 1 of 4

ATTACHMENT 5

Civil Service Commission Decision for Employee S

6716471867

CIVIL SERVICE COMMISSION

10:37:36 a.m. 11-08-2019

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PROCEDURAL BACKGROUND

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2 On March 24th, 2015, the Commission signed an Order that by a vote of 4 to 3

3 the Final Notice of Adverse Action (FNAA) in this case was procedurally defective for

4 failing to be specific as required by Department of Administration Personnel Rules and

5 Regulations (PPR) 11.311. The same Order found that Management failed to meet their

6 burden of proof which was by clear and convincing evidence. Management appealed to

7 the Superior Court of Guam on the issue of burden of proof only, ignoring the findings

8 regarding the defective FNAA.

9 The case lingered in Superior Court waiting for the Supreme Court to rule on the

10 related case of [REDACTED] which would address the same

11 issue of burden of proof. The Supreme Court finally decided on the [REDACTED] ruling that

12 pursuant to 4 GCA, § 4407(C), the Commission must make an initial determination as to

13 whether the allegations would constitute a crime. If the Employee acts were a crime, the

14 burden of proof is substantial evidence. If it is not a crime, the burden is Clear and

15 Convincing evidence. After the ruling in [REDACTED] the Superior Court remanded this

16 case to the Commission to make the initial determination of Management's burden of

17 proof. The Superior Court made no rulings reversing either of the two findings of the

18 Commission. When the case came back before the Commission, Employee filed three

19 motions to dismiss.

20 1. First, Employee moved to dismiss on the grounds that although, Management

21 had appealed to the Superior Court on the issue of burden of proof, it did not appeal

22 findings of the Commission that the FNAA was defective. Employee reasoned that

DECISION AND ORDER

Page 2 of 4

[REDACTED] vs. Port Authority of Guam

Adverse Action Appeal Case No.: [REDACTED]

Civil Service Commission Decision for Employee S

6716471867

CIVIL SERVICE COMMISSION

10:37:48 a.m. 11-08-2019

3 / 7

1 issues not raised on appeal are waived, and the decision of the Commission on this
2 issue is final. The ALJ recommended that the Commission grant Employee's motion to
3 dismiss.

4 2. Employee also moved to dismiss on the grounds that the FNAA violated the
5 60-day rule of 4 GCA, §4406. Finding that Management knew or should have known
6 on October 16, 2012, the alleged bad acts of the Employee because on that date
7 Management received a detailed report from their attorneys describing the bad acts of
8 Employee. Employee received her FNAA December 18, 2012, 63 days after
9 Management knew or should have known. The ALJ recommended that the Commission
10 grant Employee's motion to dismiss.

11 3. Employee moved to dismiss asking the Commission to sua sponte find the
12 FNAA as defective for lack of specificity required by Department of Administration
13 Personnel Rules and Regulations (PRR) 11.306. The ALJ noted the FNAA includes
14 vague accusations of conspiracy, disobedience, falsification, and conclusions as to
15 violations of the criminal code, but does not allege a specific act done by Employee.
16 The ALJ found the FNAA was not compliant with PRR 11.311, and recommended that
17 the Commission grant Employee's motion to dismiss.

18 After reading his recommendations to the Commission, the ALJ was dismissed
19 and the Commission began deliberations.

20 The Commission began the discussion by noting that the Superior Court of Guam
21 had remanded the case back to the Commission to determine the correct burden of proof
22 in accordance with [REDACTED] After discussion

23 DECISION AND ORDER
[REDACTED] vs. Port Authority of Guam
24 Adverse Action Appeal Case No.: [REDACTED]

Civil Service Commission Decision for Employee S

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CIVIL SERVICE COMMISSION

10:38:00 a.m. 11-08-2019

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1 the Commission voted 5 to 0 that no crime was alleged, and Management's burden of
2 proof is therefore clear and convincing.


3 The Commission then discussed the recommendations of the ALJ and voted 5-0
4 to adopt the recommendations of the ALJ, a copy of which is attached hereto.


5 Pursuant to 4 GCA, §4406(e) the adverse action is revoked. Employee is awarded
6 her back pay and benefits. Pursuant to 4 GCA §4406. 1. Employee is awarded
7 reasonable attorney's fees and costs. Pursuant to 4 GCA, §4406(g), Employee is
8 reinstated immediately pending Judicial Review.


9 SO ORDERED THIS 7th DAY OF November, 2019.


10 
11 LUIS R. BAZA
12 Chairperson

13 
14 Vice-Chairperson

15 
16 Commissioner


17 
18 Commissioner


19 
20 Commissioner

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22 Commissioner

23 DECISION AND ORDER

Page 4 of 4

24  vs. Port Authority of Guam

Adverse Action Appeal Case No.: 

Civil Service Commission Decision for Employee T



BEFORE THE
GUAM CIVIL SERVICE COMMISSION
BOARD OF COMMISSIONERS



IN THE MATTER OF:

[REDACTED]

Employee,

vs.

PORT AUTHORITY OF GUAM,

Management.

ADVERSE ACTION APPEAL
CASE NO. [REDACTED]

DECISION AND JUDGMENT

I
INTRODUCTION

This matter came before the Civil Service Commission for a hearing on the merits on the following dates:

June 17, 18, 24 and 26, 2014
July 1, 3, 9 and 10, 2014

Present at the hearings were [REDACTED], who was represented by [REDACTED]

[REDACTED] Present for the Port Authority of Guam ("PAG") was [REDACTED] legal counsel, and [REDACTED] for PAG Management.

II
JURISDICTION

The Civil Service Commission has jurisdiction over this matter pursuant to 4 GCA § 4403 and the PAG personnel rules and regulations.

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Civil Service Commission Decision for Employee T

III.
FACTS

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2 The PAG terminated [REDACTED] on February 25, 2013. [REDACTED] filed
3 an appeal with the Civil Service Commission on March 4, 2013. The parties presented
4 their cases to the Civil Service Commission on June 17, 18, 24, 26 and July 1, 3, and 9,
5 2014. Based on the facts proven, PAG failed to meet its burden of proving its actions
6 against [REDACTED] were correct.

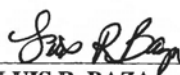

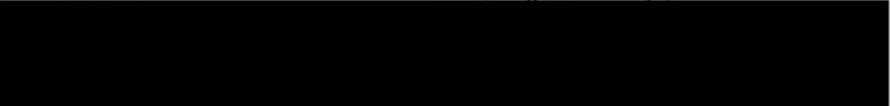


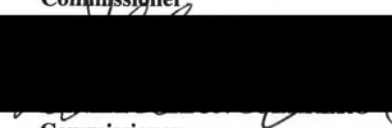


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8 IV.
CONCLUSION

9 The Civil Service Commission ruled by a vote of 5-1 in favor of [REDACTED]
10 Four (4) of the commissioners found that the PAG failed to meet its burden of proof that
11 the action against [REDACTED] was correct. One (1) commissioner did not reach issue,
12 finding that the PAG failed to take adverse action against [REDACTED] within sixty (60)
13 days that Management knew or should have known about the facts or events that were the
14 basis for its action against her. Therefore, the adverse action taken against [REDACTED]
15 is null and void.

16 The PAG is hereby ordered to immediately reinstate [REDACTED] to her prior
17 position of employment. The PAG is further ordered to fully compensate [REDACTED]
18 for all the time following her termination on [REDACTED] until the date that she is
19 reinstated including, but not limited to, salary and benefits, sick and annual leave,
20 retirement benefits, and all other benefits due and owed to [REDACTED] under Guam
21 law. Finally, the PAG is ordered to pay the attorney's fees incurred by [REDACTED]
22 during this appeal in the amount of \$18,259.50 within 30 days of this judgment.

23 IT IS SO ORDERED THIS 30th DAY OF September 2014 *nunc pro*
24 *tunc to July 10, 2014.*
25

Civil Service Commission Decision for Employee T

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2	LUIS R. BAZA Chairman	Vice-Chairman
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Civil Service Commission Decision for Employee T



BEFORE THE
GUAM CIVIL SERVICE COMMISSION
BOARD OF COMMISSIONERS



IN THE MATTER OF:

[Redacted]

Employee,

vs.

PORT AUTHORITY OF GUAM,

Management.

ADVERSE ACTION APPEAL
CASE NO.: [Redacted]

JUDGMENT OF DISMISSAL

The Civil Service Commission hereby dismisses the above captioned case with prejudice pursuant to the signed Stipulation Judgment of Settlement, attached hereto.

SO ADJUDGED THIS 30 day of December 2019.

[Redacted Signature]

Vice Chairperson

Commissioner

[Redacted Signature]

Commissioner

Commissioner

[Redacted Signature]

Commissioner

JUDGMENT OF DISMISSAL

[Redacted] vs. *Port Authority of Guam*

Adverse Action Case No.: [Redacted]

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Port Management Response



PORT OF GUAM
ATURIDAT I PUETTON GUAHAN
Jose D. Leon Guerrero Commercial Port
1026 Cabras Highway, Suite 201, Piti, Guam 96925
Telephone: 671-477-5931/35 Facsimile: 671-477-2689/4445
Website: www.portguam.com



Lourdes A. Leon Guerrero
Governor of Guam
Joshua F. Tenorio
Lieutenant Governor

December 29, 2021

The Honorable Benjamin J. Cruz
Public Auditor
Office of Public Accountability
Suite 401 DNA Building
238 Archbishop Flores Street
Hagatna, Guam 96910

Hafa Adai Mr. Public Auditor:

Thank you for allowing us the opportunity to review the draft report. We truly appreciate your acknowledgment that we handled the appeals of these employees properly. In fact, the conclusion states, *"Our performance audit of the back wages of two reinstated Port employees found that Port's reinstatements of Employee S & Employee T were generally made in accordance with administrative and judicial review judgments and orders. The legal remedies stipulated in the Agreement to Satisfy Judgment and Settlement Agreement were likewise generally complied by the Port."* We are grateful for this acknowledgment of how we handled these very complicated settlement agreements regarding the wrongful terminations of these employees.

We do recognize that we are in disagreement over the acceptance of the personnel evaluations which were neither approved or disapproved by the former General Manager. However, one thing remains certain and that is that when the analysis was conducted on the methodology we utilized for the reconstruction of these salaries, it was determined that we had in fact underpaid two reinstated employees. As such, this would mean there were no overpayment made, so far to any of the audits conducted.

Regarding the pay raise freeze mandate and potential violation on retroactive pay raises, as we pointed out in our response to you dated September 25, 2020, that based on our discussion with the Bureau of Budget and Management Research Office, we were informed that Public Law 34-116 does not apply to the autonomous agencies since we do not receive general fund appropriations. Additionally, we were also being guided by a policy issued by the Consolidated Commission on Utilities (CCU), dated October 2, 2018, which determined that Public Law 34-116 does not apply to the agencies under the CCU's purview. Thankfully, in your final report of February 2021 (OPA Report No. 21-03), you did not include this finding, and as such, we are perplexed that this is again being cited in this draft audit.

Port Management Response

Letter to Hon. Benjamin J. Cruz/Response to PAG Back Wages Series, Part B Performance Audit (October 2010 through April 2021) of December 2021: Employee S & Employee T
December 29, 2021
Page 2 of 2

Regarding the incumbent Deputy General Manager's alleged appearance of conflict of interest, we disagree with this section of the audit. Simply put, the incumbent Deputy General Manager does not have a conflict of interest because he has no personal or financial interest gained by him in his involvement with these personnel matters in his present capacity at the Port. We are enclosing the Deputy General Manager's declaration under penalty of perjury that he did not have a financial gain or any consideration as a result of his participation in these matters you cited in this draft audit.

Additionally, just as we have done with your prior audit on these similar matters and in the interest of transparency, we will be forwarding your audit along with our response to the Attorney General requesting for his review and guidance so that the Attorney General may determine if any post actions are required based on this audit.

Again, thank you for allowing us the opportunity to respond to the draft report conducted by your auditors and welcome any discussions and/or clarifications before the report is published.

S' Yu'os Ma'ase,

Rory J. Respicio
General Manager

Enclosure

Port Management Response



PORT OF GUAM
 ATURIDATI PUETTON GUAHAN
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Loures A. Leon Guerrero
 Governor of Guam
 Joshua F. Tenorio
 Lieutenant Governor

December 29, 2021

The Honorable Benjamin J. Cruz
 Public Auditor
 Office of Public Accountability
 Suite 401 DNA Building
 238 Archbishop Flores Street
 Hagatna, Guam 96910

RE: Declaration of Mr. Luis R. Baza, Deputy General Manager (“DGM”) of Finance and Administration of the Port Authority of Guam (“PAG”), in Support of PAG’s Response to the Office of Public Accountability’s (“OPA”) Draft Final Report of Performance Audit of PAG Back Wages Series B.

Hafa Adai Mr. Public Auditor:

I, **Luis R. Baza**, hereby declare as follows:

1. I am the Deputy General Manager (“DGM”) of Finance and Administration at the Port Authority of Guam (“PAG”). I submit this declaration in support of the PAG’s response to the Office of Public Accountability’s (“OPA”) Draft Final Report of Performance Audit of PAG Back Wages Series B. I have personal knowledge of the following matters and, if called upon to testify, I would and could competently testify thereto.
2. I was appointed as the Chairman of the Board of the Guam Civil Service Commission (“CSC”) in June 2003, until my resignation in December 2015. Thereafter, I was reappointed as a Commissioner on the CSC Board in September 2018. I was then appointed as Chairman by the CSC Board in January 2019, and served as Chairman of the CSC Board until my resignation on December 12, 2019.
3. I was appointed by the Governor of Guam to serve as PAG DGM on December 13, 2019, and have continued to serve in such capacity to date.
4. As Deputy General Manager of Finance and Administration, I signed the Agreement to Satisfy Judgment and NPA’s for Employees S and T’s reinstatement and salary increments from 2012 to 2019, which were all prepared in January 2020.
5. As Deputy General Manager of Finance and Administration, I did not have nor receive a personal or financial gain as a result of my official actions in my capacity as the PAG DGM, nor am I related in any way to Employees S and T.
6. As Deputy General Manager of Finance and Administration, I also did not receive any consideration in any way shape or form as a result of my participation in the signing of Port documents related to Employees S and T’s reinstatement.

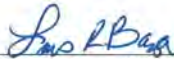
Port Management Response

Declaration of Luis R. Baza
Re: PAG Response to OPA Draft Final Report
December 29, 2021
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7. I have reviewed the applicable provision of 4 GCA Chapter 15, Standard of Conduct for Elected Officials, Appointed Officers and Public Employees of the Government of Guam §15210-Restrictions on Post Employment Title 4 GCA § 15210, and upon information and belief, my participation in the CSC and signing of Port documents related to the employees' reinstatement did not portray an appearance of a conflict of interest.

I declare under penalty of perjury of the laws of Guam that the foregoing is true and correct to the best of my knowledge.

Executed on this 29th day of December, 2021.



Luis R. Baza, Deputy General Manager
Finance and Administration
Port Authority of Guam

Status of Audit Recommendations

No.	Addressee	Audit Recommendation	Status	Actions Required
1.	Port General Manager	Consistently seek Board's ratification via a Resolution specifying the legal remedies such as: composition of the total back wages, interest, and legal fees and costs.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.
2	Port General Manager	Ensure the execution of formal & comprehensive settlement agreements disclosing therein the legal remedies such as amount and terms of gross and net back wages, mitigation, other benefits, interest charges, legal costs, and a liability release provision.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.
3	Port General Manager & Port Board of Directors	Standardize a salary increment process for reinstated employees to include a performance evaluation report to be signed by the incumbent GM.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.
4.	Port General Manager & Port Board of Directors	If recommendation #3 is not feasible, we recommend that moving forward Port management and the Board should decide on how this PRR requirement on annual increments for reinstated employees be satisfactorily complied by seeking the Attorney General's opinion.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.

Status of Audit Recommendations

No.	Addressee	Audit Recommendation	Status	Actions Required
5.	Port General Manager	Adhere to the restrictions on retroactive pay raises on performance-based increments.	OPEN	<p>Submit a corrective action plan.</p> <p>Implement no later than the beginning of the next fiscal year.</p>
6.	Port General Manager	<p>Review the following:</p> <ul style="list-style-type: none"> ➤ Port actions in granting increments during the freeze increment period. ➤ Port policy on conflict of interest 	OPEN	<p>Submit a corrective action plan.</p> <p>Implement no later than the beginning of the next fiscal year.</p>

PORT AUTHORITY OF GUAM BACK WAGES SERIES, PART B Report No. 21-09, December 2021

ACKNOWLEDGEMENTS

Key contributions to this report were made by:

Maria Thyrza Bagana, Audit Supervisor
Thomas Eladio Battung, Audit Staff
Kayleen Concepcion, Audit Staff
Benjamin J.F. Cruz, Public Auditor

MISSION STATEMENT

To ensure public trust and good governance in the Government of Guam, we conduct audits and administer procurement appeals with objectivity, professionalism and accountability.

VISION

The Government of Guam is a model for good governance with OPA leading by example as a model robust audit office.

CORE VALUES

Objectivity

To have an independent and impartial mind.

Professionalism

To adhere to ethical and professional standards.

Accountability

To be responsible and transparent in our actions.

REPORTING FRAUD, WASTE, AND ABUSE

- Call our HOTLINE at 47AUDIT(472.8348)
- Visit our website at www.opaguam.org
- Call our office at 475.0390
- Fax our office at 472.7951
- Or visit us at Suite 401 DNA Building in Hagåtña

All information will be held in strict confidence.



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